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IN THE

Supreme Court of the United States

October Term, 1955.

No. 368.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ROBERT F. RUDDY and ATLAS TACK CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Respondent, Robert F. Ruddy in Opposition.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1955



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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT ROBERT F. RUDDY IN OPPOSITION.

Opinions Below.

The opinion of the District Court is reported at 124 Fed. Supp. 470. The opinion of the Court of Appeals for the Second Circuit, which was unanimous with respect to affirmance of judgment in favor of respondent Robert F. Ruddy, is reported at 224 F. 2d 96.

Jurisdiction.

The jurisdictional requirements are adequately set forth in the petition.

Question Presented.

The term "private sidetrack" used in petitioner's question is misleading. It immediately creates an impression of control outside of the railroad, which did not exist in this case, as the evidence was that although the track was located on the premises of the industry, it was actually owned, installed and mostly maintained by the railroad and whatever maintenance was left to the industry was under the railroad's supervision and control. Therefore, we do not have presented here a clear-cut question of whether or not *res ipsa loquitur* applies to derailments on private sidetracks as a class but merely a question of whether or not on the facts of this particular case it was error for the Trial Court to include the doctrine in its charge.

Statutes Involved.

The pertinent provisions of the Federal Employers' Liability Act, 45 U. S. C. 51-60, are set forth in the petition at page 11a.

Statement of the Case.

Plaintiff-respondent Robert F. Ruddy was riding the side of a boxcar which was being pushed on a siding which ran between two buildings of an industry when the boxcar derailed causing plaintiff to be caught between the car and one of the buildings (218a, 255a, 296a, 298a).* Although the tracks were on the premises of the industry according to paragraph 1-c of the sidetrack agreement set forth in the petition at page 13a, the railroad owned and continued to own the tracks existing at the time of the

* References in parentheses in this paragraph are to pages in the appendix of the railroad company in the Court of Appeals.

agreement, and the track was the same on the day of the accident as at the making of the agreement (37a, 64a). By paragraph 1-d the railroad company was to install any needed tracks; by 1-f it retained the right to control the construction of structures adjacent to the tracks; and by 1-h it retained the right to disconnect or refuse to operate on the tracks if not maintained in safe condition. Also the section crews of the railroad gauged the track and checked the ties following the agreement (115a, 235a).

Although rules and customs required that the movement be halted if plaintiff should be out of view of the engineer or of the other brakeman (39a, 78a),** because of a curve in the track, plaintiff went out of view just prior to the derailment but the movement continued for at least 82 feet after the derailment and after plaintiff had disappeared from view (40a, 46a, 58a, 76a, 79a, 101a, 63a, 27a), and after plaintiff was pinned, the move was not halted until the 50-foot boxcar had passed completely beyond him (56a, 38a, 46a, 60a). The move was being made slowly and could have been stopped instantly if plaintiff had been in sight. The fireman signalled the engineer to continue the movement after the derailment relying on a signal taken from an employee of the industry which was misunderstood (89a, 93a).

The main body of the charge to the jury concerned negligence generally under the Federal Employers' Liability Act and there was also a charge of *res ipsa loquitur* with respect to the derailment. The jury brought in a general verdict for plaintiff and in answer to a special question in the third-party action which was tried in conjunction with plaintiff's case, the jury found that the derailment was not caused by ice, snow or refuse on the rails. Judgment for plaintiff was entered forthwith and

** References in parentheses in this paragraph are to pages of the appendix of the Atlas Tack Corporation in the Court of Appeals.

the Court of Appeals for the Second Circuit unanimously affirmed the judgment for plaintiff.

Argument.

The issue in the present case is a narrow one. It involves a determination of whether or not the terms of the particular contract with the industry and the particular facts of this case as to actual supervision and control of the tracks warrant the use of the doctrine of *res ipsa loquitur*. The case merely calls for the application to a set of facts of a well-established doctrine, the principles of which have been clearly set forth by this Court in *Sweeney v. Erving*, 228 U. S. 233, and the application of which to cases under the Federal Employers' Liability Act on a surprisingly similar set of facts has recently been described at length in *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452. A review of the present case would contribute nothing to clarify the principles of the doctrine nor its application to any class of cases but would merely be of importance to the parties involved. This was not a case which could only go to the jury by using the *res ipsa loquitur* doctrine. There was considerable evidence of active negligence on the part of other members of plaintiff's crew in continuing the movement after plaintiff was out of sight and in the taking of a mistaken signal by the fireman. If the move had stopped or plaintiff been kept in sight so that his danger could have been perceived, the accident would have been avoided. The inference created by the derailment was therefore merely additional evidence of negligence for consideration by the jury.

That the track on which this accident happened was a private sidetrack in name only is shown by the fact that the railroad owned and installed the tracks and actually performed maintenance work in gauging the rails and checking the ties. True, the agreement called for the

industry to keep the track clear of ice, snow and refuse, but as far as its own employees were concerned, the railroad thereby made the industry its agent for the clearance of ice and snow and kept control by retaining the right to disconnect service if the track was not kept clear. On the basis of these facts the railroad had such control of all of the circumstances surrounding the derailment as to warrant the application of the doctrine of *res ipsa loquitur* and the inference it created. The Courts below therefore acted correctly.

Even in the absence of such clearly defined control described above, the charge as to *res ipsa loquitur* was proper under *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452. On the facts before them the jury could have found that there was exclusive control, or, as in the *Jesionowski* case, found that the one factor over which there was not exclusive control was not a cause of the accident. The only possible non-exclusively controlled factor in this case was the clearing of ice and snow from the tracks and actually the jury in its answer to a special question in connection with the third-party claim found that ice and snow did not cause the derailment. Everything else then being clearly under the control of the railroad, the jury was entitled to consider the inference of negligence created by the derailment along with all of the other evidence of active negligence on the part of other members of the crew.

That the decision of the Court of Appeals is entirely in harmony with *Sweeney v. Erving*, 228 U. S. 233; *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452; and *Johnson v. United States*, 333 U. S. 46, is not seriously questioned. *Res ipsa loquitur* was not mentioned in *Atlantic Coast Line R. Co. v. Temple*, 285 U. S. 143 (1931), and the facts therein had little comparison with the facts in the instant case, particularly because there was overwhelming evi-

dence of sabotage in that case. The opinion in that case merely recites a detailed set of facts and states that on examination of the entire record, there is no basis for a finding of negligence. Certainly there is no principle established by that decision which is in danger of being upset by the opinion of the Court below or is in conflict with it. In any event, the *Jesionowski* decision supersedes any conclusions concerning *res ipsa loquitur* and derailments which might be gathered from the *Atlantic Coast Line* decision.

The question in this case is important to other railroads and to other industries only insofar as their sidetrack agreements are duplicates of the agreement herein and the facts and circumstances of control over their tracks are identical. It is submitted that this limits the importance of this case solely to the parties involved. If the case involved a private sidetrack where control was actually in the industry and there was no control by the railroad, a claim that the decision would be important to other railroads and industries would sound more reasonable, but, even in that event, it is submitted that the question would not be of sufficient importance to warrant review by this Court. To enumerate or classify by the manner and place of the happening of the accident the types of cases in which *res ipsa loquitur* is applicable is impossible. Needless to say, this Court cannot possibly rule on every such type of case. If this question which is confined solely to derailments and sidetracks is important enough for a review by this Court, then the Court will also be asked to review cases with questions involving derailments and public crossings, collisions and sidetracks, etc. It is enough that principles have already been established for the guidance of lower Courts in cases of this type in *Sweeney v. Erving*, 228 U. S. 233, and in *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452, and there is no important question of federal law calling for a special ruling in this case.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: September 26, 1955.

Respectfully submitted,

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